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CHARLES CLAUDE JOHNSON

No. 330

IN THE
Supreme Court of the United States

OCTOBER TERM, 1946

John P. Hooker,
petitioner,

v.

New York Life Insurance Company,
respondent.

Petition for rehearing

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Prior proceedings.

A petition for writ of certiorari was filed September 5, 1947 to bring here for review the judgment rendered in this case by the Circuit Court of Appeals for the Seventh Circuit—a judgment said to evade and undermine the rule of *Erie R. R. Co. v. Tompkins*, 304 U. S. 64, also subsequent kindred decisions of this court. The petition for certiorari was denied October 27, 1947.

Basis of present petition.

This petition for rehearing is prompted by the action of this court on October 13, 1947 granting certiorari in No. 171, *King v. Order of United Commercial Travelers of America*, to review the judgment rendered in that case by the Circuit Court of Appeals for the Fourth Circuit (161 F. 2d 108).

In the *Hooker* case the circuit court of appeals denied recovery of the indemnity for death by accidental means on the ground that the death resulted from an excluded hazard, namely, war or an act incident thereto, even though the death resulted from an accidental fall from a high cliff in course of practice maneuvers thousands of miles away from any point of conflict with the enemy. In the *King* case recovery of the insurance was likewise denied by the circuit court of appeals for the reason that the death resulted from an excluded risk, in this instance the risk of aviation or aeronautics. In the *King* case the circuit court of appeals declined to accept as controlling the dictum quoted from *Bolt v. Life & Casualty Insurance Co.*, 156 S. C. 117, 152 S. E. 766 (161 F. 2d 108, 110); also declined to follow a decision rendered in a similar case by the Court of Common Pleas for the County of Spartanburg, South Carolina (161 F. 2d 108, 110-111). Certiorari was granted in No. 171, presumably, to determine whether the decision of the circuit court of appeals is in conflict with the decisions of this court in *Erie R. R. Co. v. Tompkins*, 304 U. S. 64, *Fidelity Union Trust Co. v. Field*, 311 U. S. 169, *Six Companies of California v. Joint Highway District No. 13*, 311 U. S. 180, *West v. American Telephone & Telegraph Co.*, 311 U. S. 223, *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U. S. 487, and *Guaranty Trust Co. of New York v. York*, 326 U. S. 99.

As we understand the decisions of this court, when a non-federal case comes into a federal court merely because of diversity of citizenship, the federal court is not free to disregard relevant state decisions because the state law on the point in question has not been declared by the state court of final resort, nor because the state law has

not been declared in an exactly identical case. In the *King* case the judgment of the district court was in favor of the plaintiff-beneficiary. On the same death, a suit against another insurance company was filed in the Court of Common Pleas for the County of Spartanburg. The state court case, involving the same set of facts and a "similar policy" (161 F. 2d 108, 110), was decided after the district court decided the *King* case and, according to the circuit court of appeals, the state court "relied on" the ruling of the district court in the *King* case. Waiving aside the opinion of the *nisi prius* state court, also the dictum of the highest court of South Carolina in *Bolt v. Life & Casualty Insurance Co.*, 156 S. C. 117, the circuit court of appeals proceeded to decide the case according to its own idea of what the law ought to be, fortified by citation of analogous cases from jurisdictions other than South Carolina (161 F. 2d 108, 109-110).

The result is the same, we submit, where the federal court in a diversity case expressly declines to follow a state court precedent, or disposes of a state court precedent by cavalierly sweeping it aside as inconclusive or distinguishable, when in truth the state court case provides the rule of law decisive of the controversy.

In the *Hooker* case, we remind the court, Minton, C. J., dissented and in his dissenting opinion expressly urged that the conclusion reached by the court was contrary to Illinois law as indicated by the decision in *Mattes v. Merchants Reserve Life Insurance Co.*, 221 Ill. App. 648. (See 161 F. 2d 852, 858.) The allowance of certiorari in the *King* case, we urge, justifies reconsideration of the petition for certiorari in the present case.

*Bull v. Sun Life Insurance Co.
of Canada, 141 F. 2d 456.*

In the brief in support of the petition for certiorari, we called attention to the basic inconsistency between the decision of the Circuit Court of Appeals for the Seventh Circuit in *Bull v. Sun Life Insurance Co. of Canada*, 141 F. 2d 456, cert. den. 323 U. S. 723, and the decision of the same court in the present case. (Petition, pp. 20-21.) We noted that Major, C. J., who wrote the prevailing opinion in the present case, dissented in the *Bull* case, whereas Minton, C. J., author of the majority opinion in the *Bull* case, dissented in the present case.

The *Bull* case, like the *King* case, turned on the effect to be given to an aviation exclusion clause in the insurance contract. Lieutenant Bull's plane was shot down by Japanese combat planes, exposing him immediately thereafter to strafing by the Japanese planes. Recovery of the insurance was allowed in the *Bull* case, since the airplane had managed to effect a safe landing and the death was caused by the subsequent strafing. In the *King* case the insured was a flight observer serving with the Civil Air Patrol. The plane in which he was riding developed engine trouble and was forced to land at sea. His death did not result from the forced landing. However, several hours later, because of exposure to the wintry water the insured succumbed to drowning before rescuers could reach him. The fourth circuit court took note of the decision of the seventh circuit court in the *Bull* case, but said that the strafing of the crippled plane from which Lieutenant Bull had not yet departed might be viewed as an intervening force, therefore the case was distinguishable (but refusing, at the same time, to recognize as an intervening cause of death the long exposure of Lieutenant King to the effects

of the frigid sea, after the successful landing of the damaged plane).

Now that certiorari has been granted in the *King* case, it may well be that the final outcome in the *King* case will be a recovery of the insurance, as in the *Bull* case. The decision in the *Bull* case was apparently relied on by the district judge in the *King* case, likewise by the Court of Common Pleas for the County of Spartanburg. It would be anomalous, indeed, if the *Bull* case were to furnish the ultimate rule of decision in the *King* case, while the logic of the dissenting judge in the *Bull* case, expressive of the same basic viewpoint embodied in the majority opinion in the present case, is to govern the final decision in the present case. To avoid the possibility of such an incongruous result, we submit, certiorari should also be granted in the present case.

Respectfully submitted,

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Certificate of counsel

Isaac E. Ferguson, of counsel for the petitioner, certifies that the foregoing petition for rehearing is filed in good faith and not for delay.

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